

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. **77-1208**

LOUISE ORR ESTABROOK,
Petitioner,

versus

WATSON W. WISE and
PHILLIPS PETROLEUM COMPANY,
a Corporation,
Respondents.

Petition for Writ of Certiorari
to the Supreme Court of Florida
and
the District Court of Appeal,
First District of Florida

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OPINIONS AND DECISIONS BELOW

The Final Summary Judgment from the trial court, the Circuit Court of Santa Rosa County, Florida, was not reported, but it is set forth in the Appendix, *infra*, pp. 44A to 45A. The decision on the Appeal from that judgment is reported under the style *Estabrook v. Wise, et al*, 348 So.2d 355 (1 DCA Fla. 1977) and set

out in the Appendix at 49A to 53A. The Order of the Supreme Court of Florida denying Petitioner's Petition for Certiorari is not yet reported. The decision is styled Estabrook v. Wise (Case No. 52, 380, decided November 30, 1977) and is set out in the Appendix at 64A.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are as follows:

The District Court of Appeal, First District of Florida filed and entered its decision July 11, 1977 adverse to the Petitioner's Appeal of the Summary Final Judgment by the trial court and denied the Petition for Rehearing by its Order filed and entered August 8, 1977 (59A). This decision denied Petitioner's appeal of right to the highest court of the State of Florida having jurisdiction of such appeal.

Petitioner sought a Writ of Certiorari from the Supreme Court of Florida to the First District Court of Appeal which is a discretionary writ permitted under Article 5, Section 3(b)(3) of the Constitution of Florida, and Florida Appellate Rule 4.5C.(6), limited to a consideration of whether the decision of the District Court of Appeal conflicted with prior decisions of the Supreme Court of Florida or District Courts of Appeal of Florida. The Supreme Court of Florida denied the Petition for Certiorari by its Order

entered and filed on November 30, 1977. (64A) There is no provision under the Florida Rules for a Petition for Rehearing on such an Order. Thus Petitioner has exhausted all avenues of appellate review permitted in Florida.

The statutory provision of the United States conferring jurisdiction on this Court to entertain this Petition for Writ of Certiorari is 28 USC, Section 1257 (3) which provides this Court with authority under certain circumstances to review a final judgment or decree of the highest court of a state in which a decision could be had where the judgment turns upon a substantial federal question.

QUESTION PRESENTED

Stated generally the question presented is whether the courts of Florida failed to give full faith and credit to the laws of Texas and a judgment of a Texas court.

More specifically the question presented is whether, in spite of the full faith and credit provisions of the United States Constitution, the courts of Florida can refuse to permit a Texas resident to enforce rights in Florida realty obtained under the marriage laws of Texas, preserved by an agreement in a Texas divorce, and recognized in a Texas divorce judgment, on the ground that the Texas divorce proceeding is res judicata and a bar to a subsequent suit in Florida to enforce such rights.

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved in the case is the first sentence of Article IV, Section 1:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

STATEMENT OF THE CASE

The Petitioner, Louise Orr Estabrook, sued her former husband, Watson W. Wise, in the Circuit Court of Santa Rosa County, Florida to establish resulting or constructive trusts in mineral interests in various counties in the State of Florida including Santa Rosa County. The Petitioner and her former husband, for all relevant times, have been residents of the State of Texas, a community property state.

Phillips Petroleum Company was joined as a Defendant to set aside, reform or cancel a lease from Defendant Wise to Phillips dated December 8, 1970, relating to one of the mineral interests.

The premise of Petitioner's suit was that the mineral interests were acquired in her former husband's sole name with community funds during marriage, and that a trust arose in her favor either at the time of acquisition in the 1940's (a resulting trust) or that the Defendant concealed the interest (a constructive trust) at the time the Texas divorce commenced

in 1964 and beyond its conclusion in 1965.

Phillips was sued under allegations that it was not an innocent purchaser in that it knew of the Plaintiff's interests and participated in the concealment of such interests when it took its 1970 lease.

Plaintiff's Complaint is set out at 1A through 11A and the Amendment to Complaint (emphasizing fraud on the Plaintiff and the Texas Court perpetrated by Mr. Wise in the Texas divorce proceeding) is set out at 27A - 33A.

Mr. Wise (15A - 19A; 21A - 24A) and Phillips (11A - 15A; 26A - 27A) filed Answers and Amendments to Answers denying that the property was acquired with community funds and asserting seven affirmative defenses each. Some defenses were withdrawn, some were replaced and ten were still before the trial court when it ruled on the motions for summary judgment. For an explanation of each defense and the adjustments to the pleading see 70A - 71A.

For the purposes of this Petition, only Mr. Wise's Affirmative Defense Number 6 need be considered. In that defense he pleaded the prior Texas divorce judgment as a bar (21A - 24A) and that was the specific holding of the court (49A - 53A).

The case was before the trial court, the Circuit Court of Santa Rosa County, Florida, on Defendants' general Motions for Summary Judgment (42A - 44A).

On December 19, 1975, the trial court entered a Summary Final Judgment for the Defendants, Wise and Phillips, (44A - 45A). In this judgment the trial court found that there was no genuine issue of fact and that the Defendants were entitled to final judgment as a matter of law. No specific grounds for the judgment were stated.

Petitioner moved for rehearing, (45 A - 47A), asserting factual and legal grounds in opposition to the summary judgment and noting that the judgment made no specific findings and did not specify upon which of the ten defenses it was based. The Motion for Rehearing also requested that the judgment be reopened to clarify the grounds for the decision. On December 31, 1975, the trial court denied the Motion for Rehearing without permitting further oral argument still without stating a specific ground for the Final Summary Judgment (47A - 48A).

The Plaintiff timely filed an appeal to the intermediate appellate court, the District Court of Appeal, First District of Florida, thereby prosecuting her appeal of right to the highest appellate court of Florida.

The First District Court of Appeal of Florida handed down its decision July 11, 1977 denying the appeal of Petitioner, (49A - 53A). This opinion clearly stated

that Petitioner was barred from proceeding in Florida because of the prior Texas divorce which was found to be res judicata. In the Court's words, "We hold that the doctrine of res adjudicata (sic) controls."

Watson W. Wise and the Petitioner were married in 1930. They were then and remained thereafter residents of the State of Texas. For many years Mr. Wise had been involved in various aspects of the oil business. The mineral interests involved in the suit were acquired in the years 1945 and 1946 in several Florida counties. Title was taken in the sole name of Watson W. Wise.

In 1964 the Petitioner instituted a divorce action against Watson W. Wise in the Court of Domestic Relations of Smith County, Texas (Case No. 64-480). In that proceeding the wife sought a temporary restraining order against Mr. Wise and on July 6, 1964 Mr. Wise was restrained "...from secreting, removing or destroying..." any records of the parties relating to property and assets of the parties (37A - 41A). Further, the Texas Court found, that the temporary restraining order was necessary because,

"... Defendant would probably do irrevocable injury and damage to the interests of the Plaintiff in such property and records of Plaintiff and Defendant, and will probably secrete, destroy and remove same from the jurisdiction of this Court or beyond the reach of the Plaintiff ...

It is further ordered ... that said Defendant, Watson W. Wise, shall file with the Clerk... a complete inventory and appraisement, under oath, of all property in his possession or under his control, wherever located and claimed by the Defendant, whether he considers the same as part of the community estate, or otherwise..." (40A).

Mr. Wise on August 6, 1964 filed his sworn "complete inventory" pursuant to the above order, but that inventory failed to include any of the property sued for by Mrs. Estabrook in her instant Florida action. The affidavit portion of that inventory (35A - 37A) and admissions in the record (34A - 35A) established that none of the property sued for was included in the inventory in spite of the court order so requiring.

On May 18, 1965, the Petitioner and her former husband entered into an agreement in the Texas proceeding covering the settlement of various property rights and the preservation of rights with reference to undisclosed property. This agreement was recorded in Official Record Book 644 at Page 538 of the Official Records of the Court of Domestic Relations of Smith County, Texas (9A - 11A). The pertinent part of the agreement provided,

"... and no issue regarding community property or accounting

of community funds is to be submitted to the Court and all such issues are to be withdrawn from the pleadings. The Judgment to be entered shall state that the Court is making no adjudication of property rights between the parties. In this connection, if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto." (9A, emphasis added).

On May 25, 1965 a valid Final Judgment of Divorce was entered by the Court of Domestic Relations of Smith County, Texas, (23A - 24A). The Judgment recognized¹ the terms of the agreement of the parties in this language:

"The Court finds that all issues as to the existence or disposition of community property rights or other property rights, have, by the amended pleadings filed herein, been withdrawn and eliminated from this cause; and the Court is not called upon to adjudicate any

¹ The Florida First District opinion stated, "The final judgment of divorce was entered by the Texas court on May 25, 1965, incorporating the terms of the property settlement between the parties." (51A)

property right issues or any property or money accounting issues between said parties as no such issues remain in this cause."
(23A, emphasis added)

In 1970 Mr. Wise leased a valuable Florida interest to Phillips. Phillips conceded during the pre-trial conference that it was not an innocent purchaser without notice of Petitioner's potential interest. (See paragraph 3 of the pre-trial order, 80A).

Mrs. Estabrook testified that at the time of the divorce in 1965, she had no knowledge that these interests were retained. Neither Phillips nor her former husband revealed these interests to her at any time, and she learned from third parties in March of 1972 that these interests existed in her husband's name and that she had a potential interest since they had not been included in the divorce inventory or settlement. Mrs. Estabrook promptly employed counsel who contacted Phillips in April of 1972 and filed a suit in Texas on September 1, 1972. That suit was appealed when the Defendants successfully challenged the jurisdiction of the Texas court to make a determination of Florida mineral interests and accordingly Mrs. Estabrook instituted the instant Florida proceedings in January of 1974. Ultimately, the Texas suit was dismissed while pending on appeal by agreement of the parties who preferred to proceed in Florida where the jurisdiction of the court was not in question, and where Phillips was a proper party defendant.

Although the agreement between the parties in the Texas divorce specifically reserved their rights to pursue rights in any after-discovered property, and although the Texas decree recognized the agreement of the parties and removed adjudication of property rights from the Texas divorce, and although uncontested Texas statutory and case law permits parties to a Texas divorce action to preserve rights and pursue them subsequent to the divorce (74A - 75A), the Florida courts refused to permit this Petitioner to have any remedy, much less a trial in Florida, barring her on the ground that the prior Texas divorce was res judicata to her present action.

HOW THE FEDERAL QUESTION WAS RAISED

When the court of one state rules directly upon the effect of a judgment of another, full faith and credit is basic to that ruling. That is almost self evident. Tilt v. Kelsey, 207 U.S. 43, 28 S.Ct. 1, (1907) stands for the proposition that if the pleadings present an issue which requires one state to rule on a judicial act of another, the full faith and credit issue is adequately raised whether the issue is constitutionally labelled or not. In that case this Court said:

"They 'specially set up and claimed' a right under those proceedings, though it was not in terms stated to be a right claimed under the Constitution. This, in the case of a judgment of the court of another state, has been held to be a sufficient

compliance with the statute."
(at 207 U.S. 51; 28 S.Ct. 3;
citing cases.)

This pleading also raised an issue to be determined under the laws of Texas including the Texas law that a divorce does not bar a subsequent action for unadjudicated property. Wallack v. Wallack, 88 S.E.2d 154 (Ga., 1955) is directly on point.

The Florida appellate court acknowledged the Texas law giving rights to Mrs. Estabrook and directly ruled upon the effect of the Texas divorce decree. That was the first time a Florida court specified a ground for its holding, and in immediate response Mrs. Estabrook filed her petition for rehearing (53A - 58A) reasserting her rights under Texas law and the Texas divorce and arguing that the Florida courts were required to give "full faith and credit" to the judgment of a sister state (58A). This labelled the issue which was already unavoidable before the court.

It should be remembered that the Defendant Wise in his Affirmative Defense No. 6, first asserted the prior Texas divorce decree as a bar. Mrs. Estabrook, pursuant to the notice pleading provisions of the Florida Rules of Civil Procedure, simply filed her general denial of this Affirmative Defense (25A). Under such a denial she would have been entitled to prove any defense or avoidance of the affirmative defense at a trial on the merits should that stage have been reached. Her denial necessarily put in issue the full faith and credit to be given the Texas judgment.

The trial judge granted Summary Final Judgment without specifying which of the ten grounds of defense he relied upon. No specification was made in spite of the Petitioner's timely motion to have the grounds stated.

In her Florida appeal, the Petitioner assigned as error the entry of the Final Summary Judgment, 48A, an appropriate assignment of error considering the non-specific nature of that judgment.

In her brief on appeal, Mrs. Estabrook again set forth and relied upon the settlement agreement reached with her former husband and the Texas Final Judgment of Divorce (65A - 66A). Mrs. Estabrook also set out in her brief her reliance upon the general community property law of Texas to support her claim. (69A - 70A).

In her Reply Brief to the First District Court of Appeal, Mrs. Estabrook responded to a claim that the Texas decree barred her action by correctly arguing that the Texas decree should not be given greater impact in Florida than it would receive in Texas. She also cited Texas statutes and cases permitting a divorced person to litigate property rights subsequent to the divorce suit. (73A - 79A)

Thus Petitioner asserted in her pleadings initially and reiterated on her appeal her rights under the law of Texas, necessarily placing the issue of full faith and credit to be given the Texas law and the judgment of the Texas court before the trial and appellate courts of Florida.

The opinion of the First District Court of Appeal was the first specific ruling by a Florida court on an identified ground of defense, and that opinion held directly that the action was barred by res judicata because of the prior Texas divorce. That decision unavoidably determined the faith and credit to be given the Texas judgment.

Mrs. Estabrook's timely Petition for Rehearing directed to that opinion specifically contested the applicability of the doctrine of res judicata because "... it attempts to accord the Texas divorce decree more weight than it would be given in the State of Texas." and because "... Texas law provides that the parties to a divorce proceeding may litigate their rights to community property subsequent to their divorce." Petitioner also cited a case from the Second District of Florida which "... recognized the doctrine of res adjudicata as appropriate to the judgment of a sister state and that such judgments were entitled to full faith and credit.", a reference to the familiar provision of the United States Constitution. (See Petition for Rehearing 53A - A.)

The raising of a constitutional issue does not have to be done in any particular form of words, but the only requirement is that the issue be brought to the attention of the state court with fair precision in due time, and if the record as a whole shows this was done expressly or by clear intendment, the claim is adequately raised. Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969); cf. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973).

There is ample authority from this Court for the position that the issue is timely raised if raised and considered on appeal. Whitfield v. State of Ohio, 297 U.S. 431, 56 S.Ct. 532 (1936); Sully v. American National Bank, 178 U.S. 289, 20 S.Ct. 935 (1900).

There is even authority for raising the issue on a petition for rehearing on appeal where that is the first stage when the question reasonably could have been specifically raised, and where the state court considered the matter. Great Northern Ry Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 53 S.Ct. 145, (1932); Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779 (1914). Petitioner's petition for rehearing to the District Court of Appeal was "considered" but denied.

Upon denial of the Petition for Rehearing, Petitioner, under limited Florida constitutional authorization for certiorari to the Supreme Court, petitioned that court for such a writ (60A - 63A): Petitioner was required to show that the decision of the First District of Appeal conflicted with prior decisions of Florida appellate courts or the Florida Supreme Court. Petitioner therefore argued that the decision conflicts with other Florida cases, including "... Newton v. Newton, 245 So.2d 45 (Fla. 1971) which recognized that divorce decrees of sister states are entitled to full faith and credit under the United States Constitution Section 1, Article IV." (62A)

The issue of Petitioner's constitutional rights to the protection of her interests arising under Texas law and the Texas decree was made at every stage of the case. The issue framed by the assertion of the Texas decree as a defense inherently involved a determination of the faith and credit to be given that decree whether so labelled or not. The specific point was timely urged at the first feasible stage of the proceedings, when the Florida appellate court specified which of the several defenses its decision was based upon. Thus the federal question was raised and preserved.

THE FEDERAL QUESTION
IS SUBSTANTIAL AND IMPORTANT

This writ should be granted since the Florida courts have decided a federal question of substance in a way not in accord with the applicable decisions of this court. The decision that the Texas divorce decree is res judicata in Florida denies Petitioner her constitutional right to have the Texas divorce decree and her rights under the laws of Texas given full faith and credit in Florida.

The First District Court of Appeal of Florida, in its opinion, recognized that Petitioner had continuing rights under Texas law saying:

"The Texas court has jurisdiction pursuant to the agreement of the

parties which was incorporated in its 1965 divorce decree for the parties to further 'pursue his or her rights or remedies thereto.' " (52A)

This part of the opinion is in complete accord with Petitioner's position on Texas law that a divorce decree which does not purport to dispose of all community property interests does not prevent a party from later claiming a community property interest in some asset not specifically disposed of by the parties or by the divorce decree. (See, among those cases cited to the Florida courts, Blakely v. Herring, 374 S.W. 2d 677 (CCA Tex. 1964), Thompson v. Thompson, 500 S.W. 2d 203 (CCA Tex. 1973).

Nonetheless, the Florida courts held that the Texas divorce decree was res judicata and prohibits Mrs. Estabrook from seeking to establish her community property interests in the Florida property which is the subject of this litigation. The decisions of the Florida courts conflict with prior decisions of this court protecting the constitutional rights of citizens to have full faith and credit given to decrees and laws of sister states.

Article IV, Section I of the Constitution affords full faith and credit to divorce decrees. Venator v. Venator, 512 S.W. 2d 451 (1 DCA Mo. 1974). In fact a significant percentage of the cases decided by this Court in application of the full faith and credit clause involve divorce decrees, and many cases cited hereafter fall in that category.

The Constitution requires that a state give not some but full faith and credit to

decrees of other states. Davis v. Davis, 305 U.S. 32, 59 S.Ct. 3, 83 L.Ed. 26 (1939).

The full faith and credit to which a judgment is entitled is the credit in the state from which it was taken, not the credit that under other circumstances and conditions it might have had. (See Morris v. Jones, 67 S.Ct. 451, 329 U.S. 545, 91 L.Ed., 488, reh. den. 67 S.Ct. 858, 330 U.S. 854, 91 L.Ed. 1296.). This rule applies even though the foreign judgment offends the public policy of the local sovereign and even though the claim would not be enforceable in the forum. Roche v. McDonald, 275 U.S. 449, 48 S.Ct. 142, 72 L.Ed. 365 (1928).

One of the clearest statements of the duty of a state court to give full faith and credit to the judgment of a sister state was set forth in Tilt v. Kelsey, supra:

"When therefore we come to consider what faith and credit must be given to these judicial proceedings of New Jersey (the foreign decree), we must first ascertain what effect that state attached to them. The statute enacted to carry into effect the constitutional provision provided that they should have, in any court within the United States, such faith and credit 'as they have by law or usage in the courts of the state from which they are taken.' ... They can have no greater or less or other effect in other courts than in those of their own state." (207 U.S. at 57, 28 S.Ct. at 6.)

The limited role of the forum state in giving full faith and credit to a foreign

decree was described by Justice Story in Mills v. Duryee, 7 Cranch 481, 3 L.Ed. 411 (1813):

"It remains only there to inquire in every case what is the effect of a judgment in the state where it is rendered." (7 Cranch at 484, 3 L.Ed. at 413.)

Furthermore, the decision under review raises a federal question of substantial public importance as this court has previously held in Titus v. Wallick, 306 U.S. 282, 59 S.Ct. 557, 83 L.Ed. 653 (1939). Also this substantial federal question is reviewable by this court on certiorari. In Riley v. The New York Trust Co., 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885 (1942), reh. den. 315 U.S. 829, 62 S.Ct., 903, this court stated:

"By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence, and therefore federal questions cognizable here." (315 U.S. at 349, 62 S.Ct. at 612.)

Furthermore, the only remedy for an erroneous denial of full faith and credit is by petition for certiorari to this court. (See Porter v. Wilson, 419 F.2d 254 (9 Cir. 1969), cert. den. 397 U.S. 1020 90 S.Ct. 1260 (1970).)

Thus Petitioner asserts that a substantial federal question of public importance is raised by this Petition which is the sole basis for relief from the erroneous decisions of the Florida courts.

The decision by the Florida courts sought to be reviewed, refusing to give the Texas decree the same force and effect it would have in that state, violates not only petitioner's constitutional guarantees under Article IV, Section 1 of the Constitution, but also conflicts with our federal system of jurisprudence. The Texas court in the divorce action had personal jurisdiction of the parties. The Florida courts in this proceeding had both jurisdiction of the parties and in rem jurisdiction over the real property in which Mrs. Estabrook sought to establish a community property interest. Petitioner did not claim that the Texas divorce decree automatically affected the title to Florida real property or established interests superior to that of a bona fide purchaser without notice of her claim but rather sought to establish a resulting trust in that property arising out of her community property rights. Texas has a legitimate interest in establishing and protecting the property rights of its domiciliaries arising out of their marital status, and Florida has a constitutional obligation to respect and protect those rights.

This court in Cheever v. Wilson, 9 Wall. 108, 19 L.Ed. 604 (1869) considered the effect of an Indiana judgment where that court had personal jurisdiction of the parties in a divorce suit, but where the decree established property rights of the parties to property located in the District of Columbia. In that proceeding the court concluded:

"The decree rendered in Indiana, so far as it related to the real property in question, could have no extra-territorial effect; but, if valid, it

bound personally those who were parties in the case, and could have been enforced in the situs rei, by the proper proceedings conducted there for that purpose." (Citations omitted) (9 Wall. at 121, 19 L.Ed. at 607).

That rule applies in this action and Mr. Wise is personally bound by the Texas divorce decree and his agreement entered therein preserving Mrs. Estabrook's right to establish a community property interest in this Florida real estate. Florida was obligated to protect her rights, and having refused to do so, this Court is her only resort.

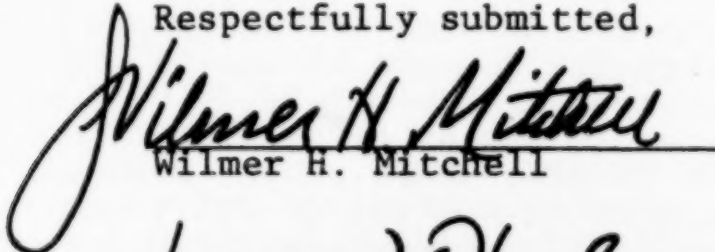
The implications of the challenged Florida decision, if allowed to stand, are of broad and substantial importance. Since it is domicile which empowers a court to dissolve a marriage (Williams v. State of North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577, reh. den. 325 U.S. 895, 65 S.Ct. 1560), domiciliaries of community property states, such as Texas, must sue for divorce in that state. However, if they are unaware of assets located in Florida and therefore do not dispose of them in the divorce, Florida will refuse to protect those rights although (1) they agreed in writing to split their causes of action for divorce and settlement of some property rights; (2) they specifically preserved the right to pursue after-discovered property; (3) they removed adjudication of all property rights from the divorce; (4) the judgment incorporated the terms of their agreement; (5) the community property laws of their domicile permitted all these acts; (6) they had no knowledge of the existence of these interests; and even though (7) one spouse

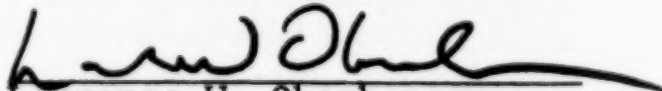
fraudulently concealed the disputed interests from the other and the court.

The Florida court's refusal to enforce rights created by and judgments rendered by sister states defeats the purpose of the full faith and credit clause and system of federal jurisprudence which is to meld independent states into a nation in which all citizen's rights arising under state laws and judicial proceedings will be respected and enforced in sister states. Johnson v. Muelberger, 340 U.S. 581, 71 S.Ct. 474, 95 L.Ed. 552 (1951); Pink v. A.A.A. Highway Express, 314 U.S. 201, 62 S.Ct. 241, 86 L.Ed. 152 (1939).

This Court should issue its Writ of Certiorari to protect the valuable property rights of Petitioner and all other similarly situated residents of community property states who, in reality, have no other way of obtaining relief from the erroneous Florida holding.

Respectfully submitted,


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APPENDIX

Omissions of irrelevant material are indicated in this Appendix by three asterisks, "* * *", and a bracketed insert follows each omission explaining the omission.

The case style of the case is set out fully in the Complaint and omitted thereafter except as to orders and decisions which are shown verbatim.

Certificates of Service are omitted, but the date of service are shown parenthetically.

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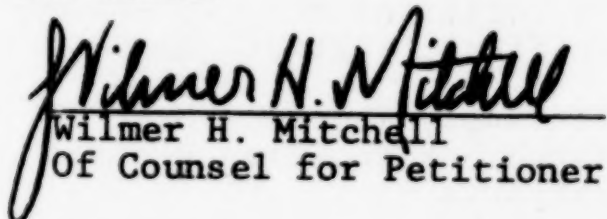
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7. Reply to Additional Affirmative Defenses	25A
8. Amendment of Defendant Phillips Petroleum Company, Substituted Third and Fourth Affirmative Defenses	26A - 27A
9. Amendment to Complaint and Reply to Additional Affirmative Defenses	27A - 33A
10. Resubmission of Request For Admissions to Watson W. Wise	34A - 35A
11. Affidavit re: Inventory in Texas divorce	35A - 37A
12. Temporary Restraining Order, Texas divorce	37A - 41A
13. Answer to Resubmission of Request for Admissions	41A - 42A
14. Motion for Summary Judgment, Wise	42A - 43A
15. Motion for Summary Judgment, Phillips	43A - 44A
16. Final Summary Judgment	44A - 45A
17. Motion for Rehearing, trial court	45A - 47A
18. Order denying motion for rehearing, trial court	47A - 48A

19. Assignments of Error	48A
20. Decision and Opinion of District Court of Appeal - First District	49A - 53A
21. Petition for Rehearing to First District, Extracts including Texas authorities	53A - 58A
22. Order Denying Petition for rehearing	59A
23. Petition for Writ of Certiorari to Supreme Court of Florida, Extracts	60A - 63A
24. Denial of Certiorari, Supreme Court of Florida	64A
25. Brief of Mrs. Estabrook to First District, Extracts	65A - 71A
26. Reply Brief of Mrs. Estabrook to First District, Extracts	71A - 79A
27. Extract from trial court's pretrial order	79A - 80A

PROOF OF SERVICE

All parties required to served with the above Petition and Appendix have been served. Three copies were personally delivered to W. Spencer Mitchem, Beggs & Lane, 700 Brent Building, Pensacola, Florida 32501, Attorney for Watson W. Wise, February 27, 1978 and three copies were mailed by regular U.S. mail, postage prepaid to William F. McGowan, Jr., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Post Office Box 3239, Tampa, Florida 33601, mailed February 27, 1978. Forty copies were hand delivered to the Clerk of this Court and filed before midnight February 28, 1978.

The undersigned is a member of the bar of this Court and has entered his appearance in the cause.


 Wilmer H. Mitchell
 Of Counsel for Petitioner

IN THE CIRCUIT COURT
 IN AND FOR SANTA ROSA COUNTY, FLORIDA

LOUISE ORR ESTABROOK,	:	
Plaintiff,	:	<u>COMPLAINT</u>
vs.	:	Case No.
	:	74-C-53
WATSON W. WISE and	:	
PHILLIPS PETROLEUM COMPANY,	:	
a Corporation,	:	
Defendants.	:	

Comes now the Plaintiff, LOUISE ORR ESTABROOK, by her undersigned attorneys, and makes this her Complaint against the Defendants, WATSON W. WISE and PHILLIPS PETROLEUM COMPANY, a corporation, and says:

COUNT I

(Against Watson W. Wise)

1. That the Plaintiff and Defendant, Watson W. Wise, are both natural persons over the age of Twenty-one (21, years and residents of Tyler, Smith County, Texas. Phillips Petroleum Company, sometimes referred to hereafter as "Phillips", is a corporation chartered under the laws of Oklahoma, qualified to do business in the State of Florida which maintains an office in Santa Rosa County, Florida.

2. This is a suit to impose a resulting trust in favor of the Plaintiff in mineral rights and other interests in certain Florida real property presently in the name of the Defendant, Watson W. Wise, a portion of which has purportedly been leased to Phillips Petroleum Company. In addition or in the alternative, the Plaintiff seeks to have her title to one-half (1/2) interest in the mineral and other rights confirmed, to have such title conveyed to her, to set aside the purported lease to Phillips, or in the alternative to have her declared a one-half (1/2) owner of the lessor's rights under the Phillips lease, and in the alternative for damages against the Defendants and for general relief. The amount in controversy exceeds the minimum jurisdictional requirements of this Court.

3. The Florida properties in question are in several counties of Florida as outlined below, and a major portion of said properties lies in Santa Rosa County, Florida.

4. On May 21, 1930, Louise Orr Estabrook and Watson W. Wise were duly and legally married in Fort Worth, Texas. They lived together thereafter as husband and wife until the summer of 1964, when they separated. On July 6, 1964, the Plaintiff, then known as "Louise Orr Wise", filed her petition for divorce in the Court of Domestic Relations, Smith County, Texas, being Case No. 64-480. Valid personal service was obtained upon Watson W. Wise in such action and he was represented by counsel therein.

5. During the course of their marriage, Louise Orr Estabrook and Watson W. Wise had accumulated a substantial amount of community property, the State of Texas being at all times relevant hereto a community property state. During the pendency of the said suit the identity and division of community assets was a matter of some dispute between the parties, and on August 6, 1964, pursuant to an order of the Court of Domestic Relations of Smith County, Texas, Watson W. Wise filed in said cause a sworn inventory and partial appraisal, sworn to be a "complete inventory" of all property that Watson W. Wise owned at that time, whether of a community nature or claimed as the separate property of Watson W. Wise. None of the mineral rights or other interests sued for in this cause were listed in said inventory.

6. That during the course of the subject divorce proceedings, Plaintiff and Defendant, Watson W. Wise, from time to time divided various items of community property and finally entered into an agreement in writing, dated May 18, 1965, a copy of which is attached hereto as Exhibit "A" and made a part hereof for all purposes, whereby they and their attorneys represented to one another that all of the community property known to them had been disclosed and divided; that any issue concerning a division of the community property was to be withdrawn from the consideration of the Court and providing additionally as follows:

"In this connection, if it should

hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto."

The Plaintiff and Watson W. Wise were divorced by a Judgment entered in the said cause May 25, 1965.

7. That on or about March 2, 1972, Plaintiff was contacted by certain persons in the oil and gas industry seeking to lease various mineral interests in the properties hereinafter described for oil and gas development who advised Plaintiff that mineral and other interests in said property had been acquired by the Defendant, Watson W. Wise, in Florida during the years 1944 to 1946 and in the State of Alabama during the same period, all of which interests were acquired while Plaintiff was duly and legally married to the Defendant.

8. The existence of the subject interests was never mentioned or disclosed during the aforementioned divorce proceeding, nor were they listed and described in the sworn inventory filed by the Defendant in said divorce proceeding and that it was only upon being contacted with reference to leasing the same that Plaintiff discovered that such interests had been acquired during her marriage to Defendant, Watson W. Wise.

9. Specifically, Plaintiff alleges that all of the interests in lands in various counties in the State of Florida described in this paragraph were acquired with the community funds of Plaintiff, Louise Orr Estabrook and Defendant, Watson W. Wise, during their marriage and that each conveyance of the properties named only the Defendant, Watson W. Wise, as the sole grantee. The interests are undivided mineral rights, mineral deeds or warranty deeds in the following described real property:

In the following parcel descriptions, N = North, S = South, E = East and W = West.

PARCEL 1

In Santa Rosa County, Florida,
to-wit:
TOWNSHIP 4 NORTH, RANGE 29 WEST
Section 11: W 1/2 SE 1/4

* * *

[Omitted are lengthy legal descriptions of property in Santa Rosa, Walton, Okaloosa and Holmes counties in Florida]

10. That said purchases made during the marriage were presumptively from the community funds of Plaintiff and her former husband, Watson W. Wise.

11. That although the State of Florida has not adopted the community

property system and the subject property hereinabove referred to is not community in character under the laws of the State of Florida, nevertheless the properties were acquired by the Defendant, Watson W. Wise, and taken in his name as the sole grantee with the use of community funds, one-half (1/2) of which belonged to the Plaintiff, and that under the law of Florida a resulting trust arose at the time of the acquisition of such title and Defendant, Watson W. Wise, thereupon became a resulting trustee for the community estate of Plaintiff and Defendant, with Plaintiff being the beneficial owner of an undivided one-half thereof.

12. That the aforementioned interests in real property in the State of Florida were never accounted for on the termination of the marriage between Plaintiff and Defendant, Watson W. Wise, and that although Plaintiff has demanded a conveyance of her interests in such property after the discovery of the existence of the same, the Defendant, Watson W. Wise, has failed and refused to make such conveyances and in fact, Plaintiff has discovered that Defendant is claiming the same as his sole and separate property.

WHEREFORE, under Count I the Plaintiff prays for relief against the Defendant, Watson W. Wise by decree of this court establishing that Defendant, Watson W. Wise holds one-half (1/2) of his interests in the above Florida lands as a trustee under a resulting trust for the benefit of the Plaintiff; that should personal service be obtained on said Defendant, he be ordered to convey to the

Plaintiff her said interests so established or that the decree of this court effect such conveyance; and in the alternative, should some or all of said interests have been conveyed away or lost to the Plaintiff, that a judgment for money damages be awarded Plaintiff against the Defendant, Watson W. Wise, and also for a judgment for damages for Plaintiff's share of any rents, bonuses or royalties received by Defendant, Watson W. Wise, which rightfully were the property of the Plaintiff, and the Plaintiff prays for such other and general relief as may be necessary in the premises and for such interest and costs of court as may be due her, and for a jury trial of all issues so triable.

COUNT II

(Against Phillips Petroleum Company)

13. Plaintiff realleges the matters and things contained in Count I.

14. On or about December 8, 1970, the Defendant, Watson W. Wise, joined by his present wife, Emma F. Wise, executed and delivered a lease of mineral interests to Phillips Petroleum Company, covering the following described tracts of land in Santa Rosa County, Florida:

TOWNSHIP 2 NORTH, RANGE 28 WEST
Section 16: SE 1/4 NE 1/4

* * *

[Lengthy legal description omitted]

Said lease is recorded in Official Records Book 221 at page 14 of the public records of Santa Rosa County, Florida.

15. At the time of the execution of said lease the Defendant, Phillips Petroleum Company had actual or legal knowledge or should have known, of the rights of the Plaintiff in said interests leased. Nonetheless, the said lease was made solely for the benefit of Defendant, Watson W. Wise, and in his name.

16. The Plaintiff has the right either to have the lease declared void, or to be declared the beneficial owner of one-half (1/2) interest in the lease, or for damages against the Defendants for any payments made or to be made, and any other damages incurred by Plaintiff as a result of said lease.

WHEREFORE, Plaintiff prays for a judgment and decree of this court cancelling and declaring void the said Phillips lease, or adjudging the Plaintiff to be the owner of one-half (1/2) interest in said lease, and requiring appropriate conveyances from Defendants to Plaintiff of her said interests, or that such conveyances be made by the decree of this court, or for damages, including interest and costs against the Defendants, and for a jury trial of all issues so triable.

HOLSBERRY, EMMANUEL, SHEPPARD
MITCHELL & CONDON
34 West Government Street
Post Office Box 1271
Pensacola, Florida 32596
Attorneys for Plaintiff

NO. 64-480

LOUISE ORR WISE) Book 644 Page 538
) In The Court of Domestic
v.) Relations In And For
) Smith County, Texas
WATSON W. WISE)

This AGREEMENT made and entered into by and between WATSON W. WISE and LOUISE ORR WISE this the 18th day of May, A.D., 1965;

W I T N E S S E T H:

It is hereby represented by Watson W. Wise to Louise Orr Wise and her attorney, W.F. Weeks, that all community property of every kind and character, heretofore existing to the marriage of the said Watson W. Wise and Louise Orr Wise, known to Watson W. Wise has been partitioned by written agreements heretofore executed, and no issue regarding community property or accounting of community funds is to be submitted to the Court and all such issues are to be withdrawn from the pleadings. The Judgment to be entered shall state that the Court is making no adjudication of property rights between the parties. In this connection, if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be entitled to pursue his or her rights and remedies thereto. Louise Orr Wise, Plaintiff, and Watson W. Wise, Defendant, the parties hereto, now assert that they have no actual knowledge at this time of any community property existing to said marriage which now remains undivided.

Exhibit "A"

W.F. Weeks, Attorney for Plaintiff,
and Jack W. Flock, Attorney for Defendant,
assert that they have no actual knowledge
at this time of any community property
existing to the marriage of the said Watson
W. Wise and Louise Orr Wise which now re-
mains undivided.

s/ Louise Orr Wise

s/ Watson W. Wise

s/ W.F. Weeks

s/ Jack W. Flock

STATE OF TEXAS)

COUNTY OF SMITH)

BEFORE ME, the undersigned authority
on this day personally appeared LOUISE ORR
WISE, wife of WATSON W. WISE, know to me to
be the person whose name is subscribed to
the foregoing instrument, and having been
examined by me privly and apart from her
husband, and having it full explained to
her, she, LOUISE ORR WISE, acknowledged such
instrument to be her act and deed, and she
declared that she had willingly signed it
for the purposes and consideration therein

EXHIBIT "A"

expressed, and that she did not wish to
retract it.

GIVEN UNDER MY HAND AND SEAL OF
OFFICE, this 18 day of May, 1965.

s/ Edgar A. Turman
Notary Public in and
for Smith County, Texas

STATE OF TEXAS)
COUNTY OF SMITH)

BEFORE ME, the undersigned authority,
on this day personally appeared WATSON W.
WISE, known to me to be the person whose
name is subscribed to the foregoing in-
strument, and acknowledged to me that he
executed it for the purposes and consider-
ation therein expressed.

GIVEN UNDER MY HAND AND SEAL OF
OFFICE, this 18 day of May, 1965.

s/ Edgar A. Turman
Notary Public in and
for Smith County, Texas

IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, STATE OF FLORIDA

* * *

[Case style omitted]

MOTION TO STRIKE, ANSWER, AND AFFIRMATIVE
DEFENSES OF DEFENDANT,
PHILLIPS PETROLEUM COMPANY

* * *

[Motion to Strike omitted]

ANSWER

For its answer to the portion of the complaint directed against it (Count II), Defendant, Phillips Petroleum Company, says as follows:

1. Admits the allegation of paragraph 1 of the complaint insofar as that paragraph states that the Plaintiff and Defendant, Watson W. Wise, are both natural persons over the age of 21 years, that defendant, Phillips Petroleum Company, is a corporation chartered under the laws of the State of Oklahoma and is qualified to do business in the State of Florida. Defendant denies that it maintains an office in Santa Rosa County, Florida, and states that it is without knowledge sufficient to form a belief as to the truth of the remaining allegations of paragraph 1.

2. Admits that a portion of the mineral rights has been leased to defendant, but defendant denies that a resulting trust can be imposed on a portion of the minerals so leased or that facts have been alleged to allow these to be set aside. Otherwise denied.

3. Admits each and every allegation of paragraph 3.

4. Defendant is without knowledge of the allegations of paragraph 4, except that defendant admits that Plaintiff and Watson W. Wise were married in 1939 and were subsequently separated and divorced.

5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 6, except defendant admits a final divorce was granted to the parties in 1965.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 8.

9. Admits that each conveyance of the minerals named only Watson W. Wise as the sole grantee. Defendant denies that the mineral interest which it has leased was obtained with "community funds." Defendant is without knowledge as to all other factual allegations of paragraph 9.

10. Defendant denies the allegations of paragraph 10.

11. Admits that the subject property is not community property under Florida law, and defendant denies all remaining allegations of paragraph 11.

12. Defendant is without knowledge or information sufficient to form a belief as

to the truth of the allegations of paragraph 12.

13. See paragraphs numbered 1-12.

14. Admits each and every allegation of paragraph 14.

15. Denies each and every allegation of paragraph 15 of the complaint, except that defendant admits that its lease was made with the record title owner, Watson W. Wise.

16. Denies each and every allegation of paragraph 16.

* * *

[Affirmative Defenses 1, 2 and 5 were withdrawn and 3 and 4 were withdrawn and replaced, hence all are omitted.]

SIXTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering any interest in the property described in the complaint in that she bases her claim for relief upon a community property agreement made and entered into in the State of Texas and upon the community property law of Texas, which have no effect in Florida or upon real property located in Florida.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering any interest in the minerals leased to

defendant since the minerals leased were not purchased in 1945 with the "community funds" of Watson W. Wise and Louise Orr Wise and were always the separate property of Watson W. Wise under the community property laws of the State of Texas.

s/ John Peter Kirtz, Jr.
Carlton, Fields, Ward,
Emmanuel, Smith & Cutler
P. A.

Post Office Box 12426
Pensacola, Florida 32582
Attorneys for Phillips
Petroleum Company

(Served February 26, 1974)

IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

MOTION TO STRIKE, ANSWER, AND AFFIRMATIVE
DEFENSES OF DEFENDANT, WATSON W. WISE

* * *

[Motion to Strike omitted]

ANSWER

Subject to his motion to strike, as stated above, defendant Watson W. Wise, answers the portion of the complaint directed against him (Count I), saying as follows:

COUNT I

1. Defendant admits that he is a natural person over the age of twenty-one years, and a resident of Tyler, Smith County, Texas.

2. Defendant admits that a portion of the mineral rights have been leased to Phillips Petroleum Company, but denies that a resulting trust can be imposed on the minerals described in the complaint or that facts have been alleged to allow the leases described to be set aside. All other allegations of Paragraph 2 are denied.

3. Admitted.

4. Defendant admits that he was duly and legally married to Louise Orr Estabrook on May 21, 1930, and that she filed a petition for divorce against him on July 6, 1964, in Smith County, Texas; all other allegations of Paragraph 4 are denied.

5. Defendant admits that at the time of his divorce from Louise Orr Estabrook, certain of the property held jointly by them was divided between them, all other allegations of Paragraph 5 are denied.

6. Defendant admits that at the time of the termination of his marriage to Louise Orr Estabrook, certain of the property held jointly by them was divided between them; all other allegations of Paragraph 6 are denied.

7. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 7 of the complaint and therefore denies the same.

8. Denied.

9. Defendant admits that each conveyance of the minerals named only this defendant, Watson M. Wise, as the sole grantee. This defendant denies that the mineral interests which are described in the complaint were obtained by him with "community funds". This defendant is without knowledge as to the remaining allegations of Paragraph 9 and therefore denies the same.

10. Denied.

11. Defendant admits that the subject property is not community property under the law of the State of Florida; and denies all remaining allegations of Paragraph 11.

12. Defendant admits that he has not at any time conveyed the property described in the complaint to Louise Orr Estabrook; denies that the said property was at any time community property and further denies all remaining allegations of Paragraph 12 of the complaint.

COUNT II

13. See this defendant's answers to Paragraphs 1 through 12 of the complaint.

14. Admitted.

15. Defendant is without knowledge as to the allegations of Paragraph 15 and therefore denies the same.

16. Denied.

FIRST AFFIRMATIVE DEFENSE

Defendant Wise alleges that the plaintiff had knowledge of his ownership, as separate property, of the property described in the complaint during the years 1964, 1965 and prior thereto, and that this action is barred by applicable statutes of limitation, and that each alleged cause of action, claim or lien did not accrue within the time prescribed by law for them prior to the commencement of this action.

SECOND AFFIRMATIVE DEFENSE

Defendant alleges that each alleged cause of action, claim or lien has lapsed because the plaintiff has been guilty of laches in that twenty-nine years have elapsed since the mineral conveyances and nine years since the divorce decree; during all of which time the plaintiff had knowledge of the ownership of the minerals described in the complaint as the separate property of Watson W. Wise; and that rights have now accrued to innocent, intervening and bona fide purchasers who had no actual or implied notice of any claim of the plaintiff to said minerals and that this defendant has further changed his position in regard to said minerals so that it is, at this time, inequitable and unjust for plaintiff to assert any rights thereto.

* * *

[Withdrawn, hence omitted]

FOURTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering any interest in the property described in the complaint because the same was not purchased with "community funds" of Watson W. Wise and Louise Orr Wise and was always the separate property of Watson W. Wise under the community property laws of the State of Texas.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovering any interest in the property described in the complaint in that she bases her claim for relief upon a community property agreement made and entered into in the State of Texas and upon the community property law of Texas, which have no effect in Florida or upon real property located in Florida.

— — —

I hereby certify that a copy of the foregoing was furnished by delivery to Wilmer H. Mitchell, Esquire, of Holsberry, Emmanuel, Sheppard, Mitchell & Condon, Attorneys for Plaintiff, 34 West Government Street, Pensacola, Florida, and upon John Peter Kirtz, Jr., of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Attorneys

for Phillips Petroleum Company, 2 North Palafox Street, Pensacola, Florida, this 4th day of March, 1974.

s/ W. Spencer Mitchem
 Beggs, Lane, Daniel, Gaines
 & Davis
 700 Brent Annex Building
 Pensacola, Florida
 Attorneys for Defendant,
 Watson W. Wise

IN THE CIRCUIT COURT OF
 SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

REPLY TO AFFIRMATIVE DEFENSES

The Plaintiff files this her reply to the affirmative defenses of the Defendants as follows:

A. As to the affirmative defenses of Defendant WATSON W. WISE, they are:

1. First affirmative defense denied.
2. Second affirmative defense denied.
3. Third affirmative defense denied.
4. Fourth affirmative defense denied.
5. Fifth affirmative defense denied.

B. As to the affirmative defenses of Defendant PHILLIPS PETROLEUM COMPANY, they are:

1. First affirmative defense denied.
2. Second affirmative defense denied.
3. Third affirmative defense denied.
4. Fourth affirmative defense denied.
5. Fifth affirmative defense denied.
6. Sixth affirmative defense denied.
7. Seventh affirmative defense denied.

(Served May 22, 1974)

s/ Wilmer H. Mitchell
 HOLSBERRY, EMMANUEL,
 SHEPPARD, MITCHELL &
 CONDON
 34 West Government St.
 P. O. Crower 1271
 Pensacola, Florida
 Attorneys for Plaintiff

IN THE CIRCUIT COURT OF
 SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

AMENDMENT TO ANSWER

Comes now defendant, Watson W. Wise, and amends his motion to strike, answer and affirmative defenses, as filed herein on March 4, 1974, to add the following affirmative defenses.

SIXTH AFFIRMATIVE DEFENSE

That this action is barred by virtue of

the final decree of divorce entered in the Court of Domestic Relations in and for Smith County, Texas, in that certain case bearing No. 64-480 in which Louise Orr Wise, now Louise Orr Estabrook, was the plaintiff and Watson W. Wise, defendant, copy of which final judgment is attached hereto, marked Exhibit "A" and by this reference made a part hereof.

SEVENTH AFFIRMATIVE DEFENSE

That any interest of plaintiff Louise Orr Estabrook in the property which is the subject matter of this litigation is limited to one-half of the value of said property either (a) at the time said property was purchased by defendant Watson W. Wise; or (b) at the time of the entry of the final decree of divorce between the said Louise Orr Wise and Watson W. Wise on May 25, 1965, plus interest on said amount as provided by law.

(Served August 26, 1975)

s/ W. Spencer Mitchem
Beggs, Lane, Daniel, Gaines,
& Davis
 Post Office Box 32950
 Pensacola, Florida
 Attorneys for said
 defendant

IN THE COURT OF DOMESTIC RELATIONS SMITH COUNTY, TEXAS

LOUISE ORR WISE)

Vs.)

WATSON W. WISE)

No. 64-480

JUDGMENT

On this May 25, 1965, the above-entitled and numbered cause came on regularly for trial. The Plaintiff appeared in person and by her attorney, and the Defendant, having filed an Answer herein, appeared through his attorney of record. The parties announced ready for trial and, no jury being demanded, the cause was submitted to the Court.

The Court, after hearing the evidence and considering the law of the case, finds that the Plaintiff, Louise Orr Wise, is entitled to an absolute divorce from the Defendant, Watson W. Wise, and to have the bonds of matrimony heretofore existing between them dissolved.

The Court finds that all issues as to the existence or disposition of community property rights, or other property rights, have, by the amended pleading filed herein, been withdrawn and eliminated from this cause; and the Court is not called upon to adjudicate any property right issues or any property or money accounting issues between said parties as no such issues remain in this cause. The only issue remaining in this cause

is the issue of whether the Plaintiff should be granted an absolute divorce from the Defendant.

The Court finds that the children of Plaintiff and Defendant have attained their seniority and are of adult age.

It is, therefore, ordered, adjudged and agreed that Plaintiff, Louise Orr Wise, is hereby granted an absolute divorce from the Defendant, Watson W. Wise, on the grounds of cruel and excessive treatment of such a nature as to render their further living together insupportable, and the bonds of matrimony existing between them are hereby, in all things, dissolved.

All costs of suit are hereby adjudged against the Defendant, Watson W. Wise, for which the officers of this Court may have their execution.

s/ Craven Beard
Judge

APPROVED:

s/ W. F. Weeks
Attorney for
Plaintiff

APPROVED as to form:

s/ Jack W. Flock
Attorney for
Defendant

Exhibit "A"

IN THE CIRCUIT COURT
FOR SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

CASE NO. 74-C-53

REPLY TO ADDITIONAL
AFFIRMATIVE DEFENSES

The Plaintiff replies to the affirmative defenses served by the Defendant Watson W. Wise August 26, 1975, and says:

1. The sixth affirmative defense is denied.
2. The seventh affirmative defense is denied.

(Served September 29, 1975)

s/ Wilmer H. Mitchell
130 East Government St.
Pensacola, Florida 32501
Attorney for Plaintiff

IN THE CIRCUIT COURT FOR
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

MOTION OF DEFENDANT PHILLIPS PETROLEUM
COMPANY TO AMEND THIRD AND FOURTH
AFFIRMATIVE DEFENSES

* * *

[Motion to Amend was granted and is omitted]

THIRD AFFIRMATIVE DEFENSE

Plaintiff has been guilty of laches in that twenty-nine (29) years have elapsed since the divorce decree, during the passage of which time numerous key witnesses have died, many material documents have been destroyed or lost, and this defendant has relied to its detriment upon the record title of the codefendant, Watson W. Wise, in purchasing the interests which are the subject of this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff is estopped to deny the validity of the oil, gas and mineral leasehold interests covering the minerals described in par. 14 of the Complaint because of her rights to the subject property, because of the negligence of the plaintiff and her representatives in failing to ascertain at the time of her divorce proceedings the identity of all property interests of defendant Watson W. Wise in which plaintiff

might claim an interest, and because of the intervening rights of defendant Phillips Petroleum Company resulting from defendant Phillips detrimental reliance upon the record title of defendant Wise, which detrimental reliance would not have occurred but for plaintiff's delay and negligence.

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH &
CUTLER, P. A.
P. O. Box 3239
Tampa, Florida 33601
Attorneys for Phillips
Petroleum Co.

By s/ William S. McGowan,
Jr.

(Served November 10, 1975)

IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

AMENDMENT TO COMPLAINT AND REPLY
TO ADDITIONAL AFFIRMATIVE DEFENSES

Comes now the Plaintiff, Louise Orr Estabrook, by her undersigned attorneys and amends her complaint as set forth

below and replies to substitute affirmative defenses 3 and 4 of Phillips Petroleum Company and says:

The complaint of the Plaintiff is amended so that the prayer for relief under Count II thereof is amended to read as follows:

"WHEREFORE, plaintiff prays for a judgment and decree of this Court cancelling, declaring void and/or reforming the said Phillips lease as to the interest of the Plaintiff in the property so leased, or in the alternative adjudging the Plaintiff to be the owner of one-half interest in said lease; and further for a judgment requiring appropriate conveyances from the Defendants to the Plaintiff of her said interest, or that such conveyances be made by decree of this Court, and for a judgment for such damages as may be due the Plaintiff from the Defendants, and for an order of this Court requiring all monies held or which may be held for the rightful owner of the interests in this suit by the Defendants or their representatives or agents to be paid forthwith to the Plaintiff with interest as allowed by law, or in the alternative for a judgment for damages for such monies and interest."

Plaintiff further amends her complaint to add Count III as follows:

COUNT III
(Against Watson W. Wise and
Phillips Petroleum Company)

17. The Plaintiff realleges the matters and things contained in Counts I and II except insofar as said allegations may conflict with the allegations of this Count, in which event the allegations of Count are in the alternative to Counts I and II.

18. This is a suit to impose a constructive trust in favor of the Plaintiff and to set aside, cancel or reform a lease to Phillips of the mineral rights and other interests in certain Florida real property described above presently in the name of the Defendants or either of them. The amount in controversy exceeds the minimum jurisdictional requirements of this Court.

19. During the pendency of the Texas divorce between the Plaintiff and the Defendant, Watson W. Wise, the said Defendant did intentionally, willfully and fraudently conceal from the Plaintiff and her attorney the fact that he had title in his own name to the interests in Florida minerals and realty described above and that such properties were community property of the Plaintiff and Watson W. Wise. Said fraudulent concealment was perpetrated by Watson W. Wise upon the Plaintiff throughout the said divorce and said defendant falsely swore to a "complete" inventory of all property in his name whether of a community nature or claimed

as separate property. The inventory is further described in paragraph 5 of this complaint, and said inventory failed to include any of the mineral rights or other interests sued for in this cause. After filing the said inventory and at all relevant times thereafter, said Watson W. Wise knowingly concealed and willfully failed to disclose to the Plaintiff the interests sued for in this cause although he knew or had reason to know: (a) that Plaintiff had a valid interest now disclosed or divided in the Texas divorce; and (b) that same should have been divided therein.

20. That Defendant, Watson W. Wise, willfully concealed and failed to disclose to the Plaintiff the said interests sued for in this cause at the time Plaintiff and Watson W. Wise were engaged in their divorce action and at the time the final decree of divorce was entered, when said Defendant, Watson W. Wise, knew or should have known that the disclosure of such interests would have caused the Plaintiff to be accorded her fair rights in such interests.

21. That Defendant, Watson W. Wise, continued willfully and fraudulently to conceal the interests sued for in this cause from the Plaintiff after their divorce and even after Phillips Petroleum Company began negotiating with Watson W. Wise to lease a portion of said interests from him. At no time did the Defendant Wise apprise the Plaintiff of the existence of the aforesaid interests or of the

fact that Phillips sought to lease a portion thereof although Defendant Wise well knew that his sworn "complete" inventory filed pursuant to court order in the Texas divorce had not included the interest Phillips sought to lease nor had it included the other interests sued for herein. In fact, the Defendant Wise on December 8, 1970, attempted to lease an entire interest in his name to Phillips without in any way advising the Plaintiff of the facts aforesaid.

22. That at all relevant times before, during and after the negotiation and execution of the lease of December 8, 1970, between the Defendant, Watson W. Wise, and the Defendant, Phillips Petroleum Company, the latter Defendant had actual and legal knowledge of the rights or potential rights of the Plaintiff in the said interests leased, and further Phillips Petroleum Company knew that Watson W. Wise had not revealed these Florida assets to the Plaintiff in the divorce proceeding or at any time thereafter. In spite of its knowledge and ability to inquire of the Plaintiff, Phillips Petroleum Company made no inquiry of the Plaintiff as to her actual or potential interests and, in fact, participated in the concealment of these assets from the Plaintiff so as to further its own interests by acquiring a lease from Watson W. Wise. Specifically, Phillips Petroleum Company was aware that the sworn inventory filed by the Defendant, Watson W. Wise, in the aforesaid divorce proceeding failed to disclose the Florida

interests sued for herein although such inventory was filed pursuant to order of court and although such inventory was required to list all properties whether thought to be owned by the community or separately by the Defendant, Watson W. Wise.

23. Because of the acts of the Defendant, Watson W. Wise, aforesaid, and particularly those alleged which occurred in the years 1964, 1965 and 1970, a constructive trust in favor of the Plaintiff arose and was imposed upon the properties sued for herein.

24. The Defendant, Phillips Petroleum Company, prior to December 8, 1970, became aware of the facts of concealment and fraud alleged above perpetrated by the Defendant Watson W. Wise, and thereafter participated in said concealment and fraud to further its interests and to the detriment of the Plaintiff, so that the Plaintiff's rights are superior to any rights of Phillips Petroleum Company in the mineral rights leased to Phillips by Watson W. Wise.

25. The Plaintiff had no knowledge that the assets involved in this suit were in the name of the Defendant, Watson W. Wise, at the time of and during the pendency of her divorce from Watson W. Wise, and thereafter until 1972 when she became aware of said interests and promptly sought to enforce her claim thereto.

WHEREFORE, the Plaintiff prays for a judgment and decree of this Court imposing

a constructive trust upon all the interests sued for in this cause and cancelling, declaring void and/or reforming the aforesaid lease of Phillips Petroleum Company of December 8, 1970, so as to render said lease void and inoperative as to the rightful interest of the Plaintiff in the property covered by said lease; and further Plaintiff prays for an order requiring appropriate conveyances from the Defendants to the Plaintiff of her said interests, or that such conveyances be made by order of this Court; and further Plaintiff prays for damages against said Defendants for all such monies as may be due her from the Defendants under the allegations of this count including interest and costs.

ANSWER TO NEW AFFIRMATIVE DEFENSES
OF PHILLIPS PETROLEUM COMPANY

The Plaintiff answers the substituted affirmative defenses of Phillips Petroleum Company numbers 3 and 4 as follows:

Affirmative defense number 3 is denied.

Affirmative defense number 4 is denied.

The Plaintiff prays that said affirmative defenses be dismissed.

s/ Wilmer H. Mitchell
MITCHELL & OBERHAUSEN, P.A.
130 East Government Street
Pensacola, Florida 32501

(Served December 4, 1975)

IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

RESUBMISSION OF REQUEST FOR
ADMISSIONS TO WATSON W. WISE

The Plaintiff resubmits Request for Admissions 3, 4, 5, 6, 7, 8, and 9 previously submitted August 1, 1974, apparently without attached exhibits, and requires the Defendant, Watson W. Wise to admit the truth of the following within thirty (30) days after the service of this resubmission:

3. That the attached Exhibit "A" is a true and complete copy of the sworn inventory and appraisal made by you and filed in the above described divorce action August 6, 1964, pursuant to an order of the Court of Domestic Relations of Smith County, Texas dated July 6, 1964.

4. That a true and complete copy of the said order of July 6, 1964, is attached hereto as Exhibit "B".

5. That your said inventory and appraisal listed none of the assets sued for in the case at bar, although you had title to such interests at the time you swore to the completeness of the inventory.

6. That you agreed to and executed the agreement dated May 18, 1965, referred to in paragraph 6 of the Complaint and

attached hereto as Exhibit "C". [Exhibit "C" is omitted since it is shown as Exhibit "A" to the Complaint.]

7. That during negotiation for and at the time of execution of the said agreement, Exhibit "C", you were represented by counsel.

8. That the settlement agreement between you and your former wife, Exhibit "C", has never been altered, amended, cancelled or rescinded.

9. That you and the Plaintiff were divorced by a judgment entered in the above described divorce case May 25, 1965, and that a true and correct copy of the said final judgment of divorce is attached hereto as Exhibit "D".

(Served December 23, 1974)

s/ Wilmer H. Mitchell
HOLSBERY, EMMANUEL,
SHEPPARD, MITCHELL &
CONDON
34 West Government Street
Pensacola, Florida 32506
ATTORNEYS FOR PLAINTIFF

AFFIDAVIT

THE STATE OF TEXAS)

COUNTY OF SMITH)

BEFORE ME, the undersigned authority
in and for said County and State, on this

36A

day personally appeared WATSON W. WISE, who being by me duly sworn on his oath says:

That affiant is the Defendant in Cause No. 64-480, Louise Orr Wise vs. Watson W. Wise, in the Court of Domestic Relations of Smith County, Texas.

That, insofar as Defendant knows and believes, the hereto attachment and papers contained within this file is a complete inventory and partial appraisement of all property in his possession or under his control, a part of which property is owned by the Plaintiff and the Defendant as their community property and the remaining part of such property is owned by the Defendant and his sister as their separate property, and that in instances in which values are placed on certain of the properties, such values are correct in the good faith opinion of the Defendant.

s/ Watson W. Wise

SWORN TO AND SUBSCRIBED before me, the undersigned authority, by the said WATSON W. WISE, on this the 6th day of August, 1964, to certify which witness my hand and seal of office.

s/ Vera Birdwell

FILED
Exhibit "A"

37A

August 6, 1974
Philip L. Dibert, Clerk
Court of Domestic Relations
Smith Co., Tex.

* * *

(The lengthy inventory attached to this affidavit is omitted. It did not include any of the Florida interests which are the subject of the instant suit.)

Exhibit "A"

IN THE COURT OF DOMESTIC RELATIONS
SMITH COUNTY, TEXAS

LOUISE ORR WISE	)	FILED July 6, 1964
	)	Philip L. Dibert
VS.	)	Clerk, Court of
	)	Domestic Relations,
WATSON W. WISE	)	Smith Co., Tex.

No. 64-480

TEMPORARY RESTRAINING ORDER

On this the 6th day of July, A. D., 1964, came on to be heard the application and Petition of Plaintiff, LOUISE ORR WISE for: (1) an inventory and appraisement of the community and other property of the parties in the hands or under the control of Defendant, WATSON W. WISE: (2) temporary alimony during the pendency of this cause;

Exhibit "B"

and (3) for an injunction and restraining order against the said Defendant, enjoining and restraining Defendant from certain acts; and it appearing to the Court from the facts stated in Plaintiff's verified Petition that the following temporary restraining order respecting the property and records and parties hereto is necessary and equitable and that the Plaintiff is entitled to a temporary restraining order and that immediate and irrevocable and irreparable injuries, loss, or damage will result to the Plaintiff before notice can be served and hearing had hereon by reason of the fact that it is made to appear by the pleadings by the Plaintiff filed herein that the community property and records of the parties is in danger of being secreted, destroyed, or removed beyond the jurisdiction of this Court, or beyond the reach of Plaintiff, by Defendant:

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED by the Court that the clerk of this court issue a temporary restraining order operative immediately until and pending the hearing below ordered, restraining Defendant, WATSON W. WISE, from (1) interfering in any manner with Plaintiff's exclusive possession and use of the home at 2001 S. Chilton Street, Tyler, Texas; and (2) from secreting, removing or destroying any of the following: Any bank statement, checks or deposit slips originating during the marriage now in his possession or under his control; any copies

Exhibit "B"

of income tax returns (State or Federal); work sheets or other instruments supporting same originating since the marriage, whether in his possession or the possession of his accountant, agent or other employee; any stocks, bonds or other securities in the possession of Defendant, or under his control or claimed by him; any cash, notes or other evidence of indebtedness owned or claimed by him; and the Court being of the opinion that it is necessary for the preservation of Plaintiff's rights that Defendant be required to make an inventory and appraisal of said community and other property mentioned in Plaintiff's verified petition; and it further appearing to the Court that unless the temporary restraining order set forth hereinabove be granted and issued, Defendant would probably do irrevocable injury and damage to the interests of Plaintiff in such property and records of Plaintiff and Defendant, and will probably secrete, destroy, or remove same from the jurisdiction of this Court or beyond the reach of Plaintiff;

IT IS THEREFORE, THE FURTHER ORDER OF THIS COURT that the Clerk of this Court issue an order commanding said Defendant to appear before the judge of this Court sitting in the Courtroom of and for the Court of Domestic Relations in the County Courthouse of Smith County, in Tyler, Texas on the 13th day of July, 1964 at 2:00 o'clock P.M., to show cause, if any he has, why the injunction in the

Exhibit "B"

terms of said temporary restraining order shall not be granted upon such petition, effective until final decree herein and further, ordering Defendant to obey the temporary restraining order herein granted until the further order of this Court.

IT IS THE FURTHER ORDER of this Court that the above mentioned show cause order shall quote this FIAT and shall be accompanied by a true and correct and certified copy of the above and foregoing Plaintiff's Original Petition.

It appearing to the Court that this is a divorce proceeding and suit and as authorized by law, no bond shall be required of the Plaintiff, and Defendant shall be bound hereby from the moment of actual notice to him, whether served with process or not.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by this Court that the said Defendant, WATSON W. WISE, shall file with the Clerk of this Court, in this cause within 30 days from the date this Order is served upon him, a complete inventory and appraisal, under oath, of all property in his possession or under his control, wherever located, and claimed by defendant, whether he considers same as part of the community estate, or otherwise, and that the value placed on same be according to Defendant's good faith opinion.

IT IS FURTHER ORDERED that the Application of Plaintiff for temporary alimony during the pendency of this suit

Exhibit "B"

as contained in her said verified petition, be heard by and before this Court at the same time and place hereinabove fixed for hearing her Application for temporary injunction hereinabove set out.

Done this the 6th day of July, A.D., 1964, at 3:35 o'clock P.M. in Tyler, Smith County, Texas.

s/ Craven Beard
Judge

Exhibit "B"

IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

ANSWER TO RESUBMISSION OF
REQUEST FOR ADMISSIONS

Defendant Watson W. Wise answers plaintiff's resubmission of request for admissions as follows:

(3) Defendant admits that he executed the instrument shown in the request as Exhibit "A"; defendant is unable to say whether or not said Exhibit "A" is complete or contains all of the property contained in the document filed on August 6, 1964 and further states that said affidavit and the property listed therein was not compiled by this defendant.

(4) Defendant admits that Exhibit "B" appears to be a true and correct copy of the order of July 6, 1964.

(5) Defendant admits that a portion of the interest here in question was titled in his name in July of 1964, a further portion was titled in his name as trustee and all of said property was held for the benefit of the plaintiff and his sister, and, to the extent that he had ownership thereof, it was his individual, separate property.

(6) Defendant admits the execution of Exhibit "C" but denies the remaining portion of said request.

(7) Admitted.

(8) Defendant is without knowledge as to the allegations of this paragraph and therefore can neither admit nor deny.

(9) Admitted.

(Served January 23, 1975)

s/ W. Spencer Mitchem

IN THE CIRCUIT COURT OF
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

MOTION FOR SUMMARY JUDGMENT

Comes now defendant, Watson W. Wise,

and moves the Court to enter a summary judgment in his favor in this matter on the grounds that the pleadings, depositions, interrogatories and exhibits admitted in this cause show that there is no issue of material fact and that said defendant is entitled to summary judgment as a matter of law.

(Served October 14, 1975)

s/ W. Spencer Mitchem

IN THE CIRCUIT COURT FOR
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

DEFENDANT PHILLIPS PETROLEUM COMPANY'S
MOTION FOR SUMMARY JUDGMENT

Defendant, PHILLIPS PETROLEUM COMPANY, moves for entry of a summary judgment in its favor and against the plaintiff, LOUISE ORR ESTABROOK, on the grounds that the pleadings, depositions, answers to interrogatories and admissions on file, together with such affidavits as may have been heretofore filed, show that there is no genuine issue as to any material fact and that this defendant is entitled to a judgment as a matter of law.

CARLTON, FIELDS, WARD,
EMMANUEL, SMITH & CUTLER, PA
P. O. Box 3239
Tampa, Florida 33601

Attorneys for Phillips
Petroleum Co.

s/ William F. McGowan, Jr.

(Served October 28, 1975)

IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, FLORIDA

Case No. 74-C-53

LOUISE ORR ESTABROOK,

Plaintiff,

Vs.

WATSON W. WISE and PHILLIPS
PETROLEUM COMPANY, a corporation,

Defendants.

Filed & Recorded in
Orders & Judgments
Book 72, page 268

FINAL SUMMARY JUDGMENT

This cause is before the Court upon the motion of the Defendant Watson W. Wise and the Defendant Phillips Petroleum Company for entry in their favor of a final summary judgment. The Court has carefully reviewed the file, the depositions, and the briefs in this cause. It is the opinion of the Court that there exists no genuine issue of fact

and that the Defendants, as a matter of law, are entitled to judgment. Therefore, it is

ORDERED, CONSIDERED, and ADJUDGED that the Plaintiff Louise Orr Estabrook take nothing by her said suit, that final summary judgment be and the same is hereby entered in favor of the Defendants, Watson W. Wise and Phillips Petroleum Company and against the Plaintiff Louise Orr Estabrook, and that said Defendants shall go hence without day.

The Court reserves jurisdiction for the sole purpose of assessing the Defendants' costs of Court upon motion.

Conformed copies furnished to Wilmer H. Mitchell, Esquire, W. Spencer Mitchem, Esquire, and William F. McGowan, Jr., Esquire.

DONE and ORDERED in Chambers at Milton, Florida, this 19th day of December, 1975.

s/ Woodrow M. Melvin
Circuit Judge

IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, FLORIDA

* * *

[Case style omitted]

MOTION FOR RE-HEARING

The Plaintiff moves for re-hearing on

the Summary Final Judgment entered December 19, 1975, pursuant to Rule 1.530 of the Florida Rules of Civil Procedure.

As grounds for the motion the Plaintiff shows that the Court's finding that there is no dispute of material facts is in error because the record demonstrates there are disputes of facts on every material issue, and such facts as are undisputed favor the Plaintiff; the Court's determination that the Defendants are entitled to judgment as a matter of law is in error in that there is no basis upon which the Defendants should have judgment as a matter of law; the original exhibit P-X-1 to the deposition of Louise Orr Estabrook (page 58) was inadvertently not attached to the deposition on file with the Court, and this exhibit is of substantial import in that it shows the context in which the Defendant Wise acquired the properties in suit; the Court has not heard oral argument since the filing of the briefs and memoranda of the parties, and the case is of such importance and the number and complexity of legal issues are such that oral argument should be permitted subsequent to the said filing.

Further, the Court in its judgment made no findings and did not specify upon which of the numerous defenses its judgment was based. In the interest of judicial time the judgment should be re-opened to clarify the grounds of the decision.

[Notice of Hearing omitted since this Motion was denied without hearing]

s/ Wilmer H. Mitchell
MITCHELL & OBERHAUSEN, P.A.
130 East Government Street
Pensacola, Florida 32501
Attorneys for Plaintiff

(Served on December 23, 1975)

IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, FLORIDA

LOUISE ORR ESTABROOK,)

Plaintiff,)

Vs.)

WATSON W. WISE and PHILLIPS)
PETROLEUM COMPANY, a)
corporation,)

Defendants.)

Case No.
74-C-53

O R D E R

This cause is before the Court upon motion of the Plaintiff for rehearing addressed to the Order of this Court granting summary judgment. Upon examination of such petition, it appears to the Court that oral argument thereon would not be helpful. Therefore, it is

ORDERED, CONSIDERED, and ADJUDGED that Plaintiff's motion for rehearing be and the

with an appeal from a final summary judgment in which the trial court found that appellant-plaintiff Estabrook had no claim of interest which she asserted in certain Florida property.

By her complaint, Mrs. Estabrook alleged that she and appellee-defendant Warren Wise were residents of Tyler, Texas, and the purpose of her suit was to impose a resulting trust in favor of herself in mineral rights in certain Florida real property which was presently in the name of Wise; a portion of which had been leased to defendant-appellee Phillips Petroleum Company. Further allegations were that she and Wise were married in Texas (a community property state) in 1930 and remained married in that state until 1964, when she filed her petition for divorce. The gist of her further allegations are that during her marriage, Wise acquired the claimed interest in Florida minerals with community property funds, and that during their divorce litigation in Texas, he willfully failed to disclose his interest in same to the Texas court. Wise, by his answer, asserted the following affirmative defenses: 1) Mrs. Estabrook had knowledge of the ownership of the separate property in Florida, and, therefore, her action was barred by the statute of limitations; 2) laches; 3) the action is barred because the subject property was not purchased with community funds; 4) Mrs. Estabrook's claim is founded upon a community property agreement entered into in Texas and upon the community property law of Texas which has

no effect upon real property located in Florida; and 5) this action is barred because of the entry of the final decree of divorce between Mrs. Estabrook and Wise.

The trial court did not recite any specific ground in its final summary judgment upon which to enter same. Our review of this extensive record discloses several valid grounds upon which to sustain same; however, we will confine our comments to the latter ground based upon the Texas divorce.

On May 18, 1965, Mrs. Estabrook (at that time Mrs. Wise) and Mr. Wise entered into a property settlement agreement which stated, in part:

"...[A]nd no issue regarding community property... is to be submitted to the Court... if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto."

The final judgment of divorce was entered by the Texas court on May 25, 1965, incorporating the terms of the property settlement between the parties. In 1972, Mrs. Estabrook filed suit in Texas claiming an interest in the Florida property, which suit was ultimately dismissed by agreement of the parties.

The Texas divorce decree was a final

judgment of divorce incorporating a property settlement agreement between the parties. Florida is not a community property state, and thus is not required to recognize an encumbrance predicated upon a foreign state's community property law. The establishment of non-record title interests arising out of marital claims should be settled in the forum state. *Finston v. Finston*, 27 So.2d 423 (Fla. 1948) *Dotter v. Dotter*, 147 S9.2d 209 (Fla. 2nd DCA 1962); *Jones v. Jones*, 140 So.2d 318 (Fla. 1st DCA 1963). The Texas court had jurisdiction pursuant to the agreement of the parties which was incorporated in its 1965 divorce decree for the parties to further "pursue his or her rights and remedies thereto." Mrs. Estabrook did pursue her alleged rights in the Texas court; however, she also sought a construction of that court's decree in the Florida court and subsequently abandoned her forum state. Any initial relief, pursuant to the final decree entered by the Texas court, should have first been resolved by that jurisdiction.

As stated in *Cooper v. Cooper*, 69 So. 2d 881 (Fla. 1954):

"As already pointed out the inquiry seems to have gone afield by developing how the parties to the original marriage had accumulated property and lost or gained in its manipulation, evidently on the theory that there should be a judicial determination of the fairness of the division when the personalty was exchanged for realty. This was a futile procedure because the divorce

case then pending had, meanwhile culminated in a final decree and property rights then and there became settled. *Finston v. Finston*, 160 Fla. 135, 37 So.2d 423. We announced there the rule 'that a final decree * * * settles all property rights of the parties and bars any action thereafter brought by either party to determine the question of property rights.' In that case the court had before it the question of property rights and held that the doctrine of *res judicata* controlled. Here the property rights were not introduced in the litigation but they could and should have been so the same rule applies here as will be seen by an examination of our opinion in *Town of Boca Raton v. Moore*, 122 Fla. 350, 165 So. 279, cited as authority for the rule stated in *Finston v. Finston*, *supra*."

We hold that the doctrine of *res adjudicata* controls. The judgment appealed is

AFFIRMED.

SMITH and ERVIN, JJ., CONCUR

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

* * *

[Case style omitted]

PETITION FOR REHEARING

The Appellant files its Petition for Rehearing directed to the opinion of this Court filed July 11, 1977, and shows as follows:

1. In concluding its opinion this Court states, "We hold that the doctrine of res adjudicata controls." Apparently the Court thus ruled that the Plaintiff/Appellant here was barred from bringing an action against her former husband because of their Texas divorce in 1965.

Such a holding by this Court is erroneous in that it attempts to accord the Texas divorce decree more weight than it would be given in the State of Texas.

There is not any dispute that if the Appellant and the Appellee, Wise, litigated all their property rights, including the Florida rights involved in this suit, in the Texas divorce proceedings, and if that decree finally determined those matters, the instant case would be barred. However, Texas law provides that the parties to a divorce proceeding may litigate their rights to community and other properties subsequent to their divorce. In fact any property not disposed of in the divorce proceeding is presumed to be community property absent a clear and convincing showing to the contrary. Where a divorce has been granted without an adjudication of the property rights of the parties, the wife may subsequently maintain an action

to sue for the protection of her community property interest. Furthermore, the wife cannot be presumed to have full knowledge of all of the property to which she may have a claim, and an inventory by commissioners appointed in the suit for divorce is not conclusive on the wife. (See 20 Tex. Jur. 2d "Divorce and Separation" Section 265, copy attached.)

A Texas decree of divorce does not purport to make a partition of the community property between the husband and wife unless such partition is particularly set forth therein. Furthermore, any overlooked property interests are subject to review absent a "residuary clause" in the decree of the court. A Texas divorce decree does not preclude a subsequent suit by either party for such partition. (See Texas Family Law "Divorce, Suits and Separation" Section 5:72 and Section 5:138, copies attached.)

Texas cases recognize that it is perfectly proper for a Texas divorce court to withhold disposition of some or all property rights in a divorce action, and the parties thereafter have a right to litigate questions of community property in later proceedings dealing with property not so divided. See Blakely v. Herring, 374 SW 2d 677 (CCA Tex. 1964), recognizing that a party to a divorce in which his right to certain property is not partitioned may have the property adjudicated in a subsequent proceeding. Busby v. Busby, 457 SW 2d 551 (Tex. 1970) is a case in which the

Supreme Court of Texas specifically found that where community property rights were not partitioned at the time of a divorce proceeding, the judgment entered in a divorce suit did not preclude the former wife seeking partition of the undivided community property in a subsequent suit. See also Thompson v. Thompson, 500 SW 2d 203 (CCA Tex. 1973).

In the Texas divorce between Mr. Wise and Mrs. Estabrook the Final Judgment entered by the Texas court specifically provided (pursuant to an agreement and clear understanding of the parties):

"that all issues as to the existence or disposition of community property rights, or other property rights, have, by amended pleadings filed herein been withdrawn and eliminated from this cause."

The reason the judgment recognized that the court did not deal with the property of the parties was because of an agreement between the Appellant and her former husband, dated May 18, 1965 which provided:

"...and no issue regarding community property or accounting of community funds is to be submitted to the Court and all such issues are to be withdrawn from the pleadings. The Judgment to be entered shall state that the Court is making no adjudication of property rights between the parties. In this connection, if it

should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto." (emphasis added)

Thus, it is seen that the Texas divorce decree did not litigate the property rights of these parties and they specifically withdrew those rights from the Court and preserved to themselves the rights to pursue any other remedies with reference to property not divided. Under the law of Texas and the authorities cited above, the parties would have that right and no subsequent action would be barred by res adjudicata. There was no decision by the Texas court which would bar the Appellant from suing in Texas, and this Court is in error if it attempts to give the Texas decree greater effect in Florida than it would have in Texas. Accordingly, the Texas decree is not res adjudicata as stated by this Court in its opinion of July 11, 1977.

* * *

[Irrelevant portions omitted]

3. Since this case was briefed and argued the Second District has decided the case of Strickland v. Strickland, 344 So.2d 931 (2 DCA Fla. 1977) in apparent conflict with the present decision of this court. In the Strickland case the ex-wife brought an action for partition of Hendry County property asserting an undivided one-half interest therein. The defendant responded with a counterclaim pleading a

prior Florida support proceeding and a 1973 Georgia divorce decree. He claimed that the issues raised were thus barred by res adjudicata.

The Second District disagreed because the Georgia decree specifically indicated that it was not making a determination as to the real estate and there was no adjudication as to property rights of the parties in the subsequent Florida support case. The Second District recognized the doctrine of res adjudicata as appropriate to the judgment of a sister state and that such judgments were entitled to full faith and credit. (emphasis added)

* * *

For the above reasons the Petition for Rehearing should be granted and the Summary Judgment reversed.

Respectfully submitted,

s/ Wilmer H. Mitchell
MITCHELL & OBERHAUSEN, P.A.
130 East Government Street
Pensacola, Florida 32501
Attorney for Appellant

(Served July 25, 1977)

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1977

LOUISE ORR ESTABROOK,)
)
Appellant,)
)
vs.)
)
WATSON W. WISE and)
PHILLIPS PETROLEUM)
COMPANY, a corporation,)
)
Appellees.)

Case No.
AA-444

O R D E R

Petition for Rehearing and Response thereto having been considered,

IT IS ORDERED that the petition is hereby denied.

By Order of the Court dated this 8th day of August, A. D. 1977. Acting Chief Judge John S. Rawls, Judge Robert P. Smith, Jr., Judge Richard W. Ervin, III.

A True Copy

ATTEST:

RAYMOND E. RHODES, CLERK

s/ Raymond E. Rhodes
District Court of Appeal, First District
Tallahassee, Florida

IN THE SUPREME COURT OF FLORIDA

LOUISE ORR ESTABROOK,)
)
 Petitioner,)
)
 v.)
)
 WATSON W. WISE and)
 PHILLIPS PETROLEUM)
 COMPANY,)
)
 Respondents.)
 _____)

PETITION FOR A WRIT OF CERTIORARI TO THE
 DISTRICT COURT OF APPEAL - FIRST DISTRICT

TO THE SUPREME COURT OF THE STATE
 OF FLORIDA:

Petitioner, Louise Orr Estabrook,
 presents this her petition for a writ of
 certiorari and states:

1. Petitioner seeks to have reviewed
 a decision of the District Court of
 Appeal, First District, filed July 11,
 1977, Petitioner's Petition for Rehearing
 having been denied August 8, 1977.

2. This petition is presented under
 and pursuant to Article 5, Section 3(b)
 (3) of the Constitution of Florida, and
 Florida Appellate Rule 4.5c.(6).

* * *

A. (1) The First District's opinion
 conflicts with Strickland v. Strickland,

344 So.2d 931 (2 DCA Fla. 1977). In the
 Strickland case the ex-wife brought an
 action for partition of Hendry County
 property asserting an undivided one-half
 interest therein. The defendant responded
 with a plea that a prior Florida support
 proceeding and a 1973 Georgia divorce de-
 cree barred the suit by res judicata.

The Second District disagreed be-
 cause the Georgia decree specifically in-
 dicated that it was not making a determi-
 nation as to the real estate and there
 was no adjudication as to property rights
 of the parties in the subsequent Florida
 support case. The Second District recog-
 nized the doctrine of res adjudicata as
 appropriate to the judgment of a sister
 state and that such judgments were en-
 titled to full faith and credit. The
 court then correctly pointed out the key
 to whether the foreign decree will be
 applied as a bar stating: (emphasis
 added)

"However, this is confined to those
 issues, the subject matter and par-
 ties properly before the court in
 the prior proceeding. See Matthews
v. Matthews, 133 So.2d 91 (Fla. 2d
 DCA 1961). Neither the Florida real
 property involved in these pro-
 ceedings, the status of its title,
 the rights or claims of the parties
 with respect thereto, nor the facts
 and circumstances bearing on such
 were involved or determined in the
 Georgia proceedings."

* * *

C. The express terms of the foreign divorce decree and the separation agreement of the parties preclude the prior suit from being res judicata.

(1) The decision on review had to be premised on conclusions that neither the Texas decree nor the separation agreement is valid and enforceable. The First District's holding directly conflicts with the decision of the Florida Supreme Court in Aldrich v. Aldrich, 163 So.2d 176 (Fla. 1964) holding (1) that a final and unappealed decree of an equity court, even if not authorized by statute and beyond the court's inherent power, nevertheless is valid on its face and enforceable against a party to that proceeding; and (2) a party to a separation agreement is bound by its terms even if it contains provisions which an equity court could not order if the issue were litigated.

(2) The Texas divorce decree specifically noted that no issues of property rights were submitted to the Court. That decree is presumed valid on its face and the trial court is not at liberty to ignore the binding order of that foreign court. Thus this decision conflicts with this court's decision in Newton v. Newton, 245 So.2d 45 (Fla. 1971), which recognized that divorce decrees of sister states are entitled to full faith and credit under the United States Constitution §1, Article IV. (emphasis added)

(3) The decision under review also conflicts with Donner v. Donner 302 So. 2d 452 (3 DCA Fla. 1974) a case involving an agreement to make a will set forth in

a written separation agreement entered in the State of New York March 2, 1959, which was incorporated in an April 1959 Alabama divorce decree. The husband neglected to make his will in accordance with the agreement and his ex-wife sued his estate in Florida.

Although the agreement did not comply with the Florida statute regulating contracts to make a will, the Florida court enforced the separation agreement and held that it is entitled to full faith and credit in Florida, stating: (emphasis added)

"Where a court of competent jurisdiction enters a valid divorce decree and therein specifically approves a separation agreement and incorporates it in the decree, the agreement may be said to be valid and enforceable, and collateral attack upon it will not be allowed, even if the agreement is not merged into the decree." (citing cases) "This is also true when the decree is rendered by a sister state and full faith and credit applies." (emphasis added) (302 So.2d at 457)

* * *

s/ Wilmer H. Mitchell

s/ Lawrence W. Oberhausen

(Filed September 6, 1977)

SUPREME COURT OF FLORIDA

Wednesday, November 30, 1977

LOUISE ORR ESTABROOK,)	
)	
Petitioner,)	
	)	Case No. 52,380
vs.)	
	)	DISTRICT COURT
WATSON W. WISE and	)	OF APPEAL
PHILLIPS PETROLEUM)	
COMPANY,	)	FIRST DISTRICT
)	
Respondents.	)	AA-444

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., SUNDBERG, HATCHETT, KARL, JJ. and DREW, RET. J., concur

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

s/ D. Causseaux

"Extracts from Appellant Brief to District Court of Appeal of Florida, First District"

* * *

On May 18, 1965, the Plaintiff and Watson W. Wise entered into an agreement which was recorded in Official Records Book at page 538 of the Official Records of the Court of Domestic Relations of Smith County, Texas. Said agreement provided,

"... and no issue regarding community property or accounting of community funds is to be submitted to the Court and all such issues are to be withdrawn from the pleadings. The judgment to be entered shall state that the Court is making no adjudication of property rights between the parties. In this connection, if it should hereafter appear that either party desires to claim that some community property has not been divided, he or she shall be free to do so and shall be entitled to pursue his or her rights and remedies thereto. Louise Orr Wise, Plaintiff, and Watson W. Wise, Defendant, the parties hereto now assert that they have no actual knowledge at this time of any community property existing to said marriage which now remains undivided." (emphasis added) [R259, All]

The attorneys for the parties affirmed the same knowledge [R259; All]

On May 25, 1965, the final judgment of divorce was entered and said judgment incorporated the terms of the agreement using this language,

"The Court finds that all issues as to the existence or disposition of community property rights or other property rights, have, by the amended pleadings filed herein, been withdrawn and eliminated from this cause; and the Court is not called upon to adjudicate any property right issues or any property or money accounting issues between said parties as no such issues remain in this cause." [R262; A23]

* * *

Defendants asserted at trial that the Texas community property law cannot be applied by this Court so as to affect the interests of parties in Florida real estate which is the subject of this litigation. This, however, is not the case.

Florida courts have recognized that the interest of one spouse in property acquired by the other during marriage is determined by the law of the domicile of the parties when the property was acquired. In Quintana v. Ordone, 195 So. 2d 577 (3 DCA Fla. 1967), cert. discharged 202 So.2d 178 (Fla. 1967), the Third District considered this exact question which arose with regard to Florida assets which were acquired by one spouse while married and domiciled in Cuba, a community property country. The Florida

Court stated:

"Under Florida law, if a portion of the consideration belongs to the wife and title is taken in the husband's name alone, a resulting trust arises in her favor by implication of law to the extent that consideration furnished by her is used. A resulting trust is generally found to exist in transaction affecting community property in non-community property states where a husband buys property in his own name..." (at 580)

The Quintana case involved personalty rather than realty but the principles are the same. In Quintana, the Florida court cited with favor a Mississippi case which did involve realty, Stone v. Sample, 216 Miss. 287, 62 So.2d 307, 63 So.2d 555 (Miss. 1953), a case in which the material facts are virtually identical to those in this case.

In Stone v. Sample, the husband purchased certain mineral rights in the State of Mississippi (a non-community property state) while he was a married man and a resident citizen of the State of Texas. The conveyances were made to the husband alone. The Mississippi taxing authorities attempted to impose a tax upon the husband as the sole owner of the property, and the husband and wife resisted, asserting that they were joint owners in accordance with the community property law of Texas which governed their interests in the Mississippi real estate. In ruling that the property was, in fact, subject to a

resulting trust in the wife, the Mississippi Court, facing the exact issue which is before this Court, stated:

"The Commission invokes the rule that real property is controlled by the law of its situs. That, of course, is true. This is not an effort to transport the Texas community law into this state. The title of Mrs. Sample to a half interest in the property in Mississippi does not result from application of the community law of Texas to the real property in Mississippi. The trusteeship comes about as a result of using her money in the purchase of the property regardless, as above stated, how or where she acquired title to the money. The same result would have come about had she acquired such title in a noncommunity property state. There is no prohibition against a nonresident of Mississippi asserting a resulting trust in lands in this state."
(at 309)

In other words, the Mississippi court reasoned that the wife's interest under the community property law of Texas arose in the assets which were used to purchase the land in Mississippi. The law of Texas controlled the wife's interest in those funds and, therefore, the Mississippi Court recognized her interest in Mississippi real estate which was purchased with those joint assets. The Mississippi court's analysis

is exactly applicable to the facts in this case. Florida has relied upon that analysis and adopted it in Quintana v. Ordonez, supra, expressly recognizing to that extent the impact of foreign community property law on Florida property.

The important thing is not the nature of the asset, but whose funds were used to make the purchase. If a wife's funds from any state are used to purchase Florida assets of any kind, a resulting trust arises which is enforceable in equity. The fact that her ownership of the funds was a result of the community property law of her domicile is of no consequence. Important exceptions are appropriate to protect bona fide purchasers or third parties entitled to rely on record title to real property, but no innocent third party is involved in this case.

This is in accord with the recognized rule stated in Principles of Community Property, supra, at page 224:

"§92 -- Property removed to or acquired in state other than domicile.

Where the spouses without changing their domicile send or remove property to another state, it is recognized in the latter state that it retains the same nature it had when sent or removed from the domicile of the spouses. Thus, property which is separate property in the noncommunity property domicile of the spouses is recognized as separate property if sent or removed to a

community property state, and conversely community property of the spouses in a community property domicile of spouses remains the property of both although removed to a community property state and although the title appears in the name of one of the spouses only. Even if the form of the property is changed after its removal, by conversion to some other type of property, the nature of the ownership rights is not affected thereby..." (emphasis supplied)

* * *

The Defendants denied that the property was acquired with community funds and filed a variety of affirmative defenses which will be reviewed in detail at the conclusion. Reviewing the defenses: #1 Mr. Wise alleged that the Plaintiff had knowledge of these interests and was barred by the statute of limitations [R19, A19]; #2 Plaintiff is barred by laches and rights accruing to an innocent purchaser [R19, A19]; #4 purchase was not made with community assets [R20, A20] (Phillips also asserts this defense as its #7); #5 the claim is barred because it is based upon the community property law of Texas which has no effect in Florida [R20, A20] (Phillips also asserts this defense as its #6); #6 Plaintiff is barred by the 1965 Texas divorce [R29, A21]; #7 Plaintiff is limited to the amount of her recovery to one-half the value of the property at the time of purchase or divorce [R95, A21].

Note that Mr. Wise withdrew his affirmative defense #3 and Phillips withdrew its defenses #1, #2 and #5.

Phillips affirmative defenses #3 and #4 originally alleged that Phillips was an innocent purchaser protected by laches and estoppel, respectively [R16, A16]. Significantly, Phillips withdrew these defenses conceding that it was not a bona fide purchaser without notice and substituted #3 laches because of delay, lost evidence and Phillips' detrimental reliance on the record title [R103, A25] and #4 estoppel because of delay, Plaintiff's negligence in failing to ascertain her rights and Phillips' detrimental reliance upon the record title [R103, A25].

s/ Wilmer H. Mitchell

(Served March 16, 1976)

"Extracts from Reply Brief of Appellant to the First District Court of Appeal of Florida"

* * *

II. THIS SUIT IS NOT BARRED BY THE TEXAS DIVORCE

Appellees have asserted that the final divorce decree in Texas bars this lawsuit. In arguing this point, Appellees misstate the facts, ignore the effect of the Texas decree and argue totally inapplicable

propositions of law.

A. Facts.

The following facts are undisputed:

(1) At the time of the divorce, the parties stipulated that, aside from their agreed distribution of property rights, no other property rights were to be determined by the divorce proceeding and were not to be submitted to the court;

(2) The final judgment entered by the Texas court provided:

"That all issues as to the existence of disposition of community property rights, or other property rights, have, by amended pleadings filed herein been withdrawn and eliminated from this cause.";

(3) The Texas trial court in the divorce proceeding required Defendant Wise to file a sworn inventory of all assets, basing that order upon its ruling that, in the absence of such an order, that Defendant would most likely hide assets from the Appellant; and

(4) The sworn inventory filed by Appellee Wise failed to disclose the Florida property interests here in question.

* * *

(2) Appellant's authority.

Appellant has set forth in some detail the foregoing matters distinguishing Appellees' cases and demonstrating the willingness of Florida courts to review judgments obtained by misrepresentation. Nevertheless, it is not necessary to reach that point in this proceeding because the Texas court never made any determination of the property rights of the parties, and this court should not give the Texas decree a greater impact than it would have in the state of rendition.

Texas law provides that parties to a divorce proceeding may litigate their rights to community property subsequent to that divorce. In fact, any property not disposed of in the divorce proceeding is presumed to be community property absent a clear and convincing showing to the contrary. Specifically, where divorce has been granted without an adjudication of the property rights of the parties, the wife may subsequently maintain an action to sue for the protection of her community property interests. Furthermore, the wife cannot be presumed to have full knowledge of all of the property to which she may have a claim, and an inventory by commissioners appointed in the suit for divorce is not conclusive on the wife. (In this regard, see 20 Tex. Jur. 2d "Divorce and Separation" §265, a copy of which is attached hereto for the Court's reference.)

A Texas decree of divorce does not purport to make a partition of the com-

munity property between the husband and wife unless such partition is particularly set forth therein. Furthermore, any overlooked property interests are subject to review absent a "residuary clause" in the decree of the court. A Texas divorce decree does not preclude a suit by either party for such partition and the court's sole authority in such a suit is to divide equally such community property between the parties. (See Texas Family Law, "Divorce Suits and Separation," §5:72 and §5:138, copies of which are attached hereto for the Court's reference.)

The following are only a few of numerous Texas cases recognizing the propriety of Texas courts withholding disposition of all property rights in a divorce action and the subsequent right of the parties to litigate questions of community property in later proceedings dealing with property not so divided. In Blakely v. Herring, 374 S.W. 2d 677 (CCA Tex. 1964) the Texas court expressly recognized that a party to a divorce decree in which the parties' rights to certain property is not partitioned may have those property rights adjudicated in a subsequent proceeding. In Busby v. Busby, 457 S.W. 2d 551 (Tex. 1970), the Supreme Court of Texas specifically found that, where community property rights were not partitioned at the time of a divorce proceeding, the judgment entered in a divorce suit did not preclude the former wife seeking partition of the undivided community property in a subsequent suit. Numerous additional

cases could be cited on this point as the law is absolutely clear and settled in Texas that, when a Texas divorce decree does not dispose of all community property rights, a party may bring a subsequent action to litigate those interests. (See additionally Thompson v. Thompson, 500S.W. 2d 203 (CCA Tex. 1973).)

Therefore, there is ample Florida and Texas precedent for a proceeding such as this and the judgment of the Texas court is not res judicata on Appellant's interest in the subject property. No question of these interests was decided by the Texas court which would bind Appellant in greater effect in Florida.

* * *

§5:72 TEXAS FAMILY LAW

§5:72 Property not divided

A court decreeing divorce or annulment should divide the estate of the parties. The courts have pointed out the necessity for the inclusion of all of the assets when attorneys prepare for a divorce hearing. If all property owned by the community is disposed of by agreement and judgment, a subsequent suit cannot be brought. However, in a property settlement agreement not containing a clause whereby each party conveyed to the other property or property rights not specified in the agreement, and certain property interests were not covered by the agreement and were not discovered until after rendition of the divorce decree, the

agreement and the decree do not constitute an adjudication or disposition of the community property interest owned in said properties, and each spouse is entitled to an interest in said properties. The divorce decree is res judicata as to all property interests settled therein.

It has been held not to be an abuse of discretion to refuse to reopen a case five months after the entry of a divorce decree to permit evidence to be introduced as to property not disposed of by the decree, where the decree does not purport to dispose of any claim that the party might have in the property.

If the divorce decree fails to dispose of all property rights of the parties, the parties remain owners of the property as tenants in common, either spouse may sue to recover an interest as a tenant in common in any community property on hand at the time of dissolution of the marriage. The former spouses are tenants in common of community property so omitted, and partition must be sought in a new action in the district court. Either party may subsequently demand partition of the property which has not been previously divided. This rule applies to disability and retirement benefits not divided on divorce.

There is no assumption that items of property not specifically mentioned in a divorce decree were awarded to either party. A failure to deliver property not specifically mentioned cannot constitute a violation of the decree and

thus cannot be punished by contempt.

The power of the divorce court to divide property "as may be just and right" is limited to a suit for divorce. Such power cannot be exercised in a subsequent suit for the division of undisclosed community property,

In a suit for division of community property after divorce, the parties are treated as if they had never been married.

Where the only issue is a suit is the proper disposition of the community property, the suit may not, as against a former spouse's plea of privilege, be maintained in the county in which the plaintiff resides, the defendant being a resident of another county.

Since, in the absence of partition of property, divorced parties are tenants in common in the community property, the possession of one being the possession of both, the right of the community estate to claim the benefit of the wife's adverse possession of land conveyed to the husband under a tax deed is not destroyed by a divorce.

* * *

§5:138. Property of the parties

The community estate is a statutory estate, dependent on the existence of the marriage of which it is an incident, and the community estate as such is terminated on dissolution of the marriage by death, divorce, or annulment. Divorced parties become tenants in common in the

former community, in the absence of a judicial partition.

If a decree of divorce does not purport to make a partition of the community property between the husband and wife, it does not preclude a suit by either party for such partition, but so long as the divorce decree stands, a spouse may not be awarded more than a half interest in such property. A partition may not be had if the divorce is invalid.

The status of the property as community is not restored by the remarriage of the parties. Each spouse thereafter deals with such property as one of the owners and not as agent or representative of the community or of the other spouse.

The fact that the husband transferred the property to the possession of others will not bar the wife's right to sue for the protection of her community interest where the rights of other persons do not intervene.

The failure of the wife in her pleadings in the suit for divorce to describe all the property comprising the community estate does not conclude or restrict her from later seeking her share of the property. It has been said that the wife cannot be presumed to have full knowledge of all the property to which she may have a claim. And neither is an inventory by commissioners appointed in the suit for divorce conclusive on the wife.

A party may also bring a separate suit to recover payment due from the other, under the divorce decree.

An action brought after divorce, for a division of community property that was not disposed of in the decree, is not an action for divorce, and the issuance of an injunction in such a proceeding without requiring the filing of a bond is error. Furthermore, bond is required in the case of injunctions against third persons.

(Served June 7, 1976)

IN THE CIRCUIT COURT IN AND FOR
SANTA ROSA COUNTY, FLORIDA

LOUISE ORR ESTABROOK,)	
)	
Plaintiff,)	
)	
vs.	)	Case No.
	)	74-C-53
WATSON W. WISE and)	
PHILLIPS PETROLEUM COMPANY,)	
a corporation,)	
)	
Defendants.)	

ORDER

The parties having appeared before the Court November 10, 1975, for a pre-trial conference,...

* * *

3. The Defendant Phillips Petroleum Company conceded by its counsel present at the hearing that its third and fourth affirmative defenses, based upon allegations that Phillips was a bona fide purchaser without notice, cannot stand in light of the testimony developed on discovery as to the knowledge of Phillips of the potential rights of the Plaintiff at the time it made the lease with Defendant Watson W. Wise.

* * *

DONE AND ORDERED in Milton, Florida,
this 3rd day of December, 1975.

s/ Woodrow M. Melvin